No. 75-1884

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1976

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KENNETH J. CROUCHER, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES

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ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioners contend, *inter alia,* that their prosecution by the federal government for conspiracy to import and possess marijuana after they had been convicted by the State of New Mexico of possession of the same marijuana violated the Double Jeopardy Clause of the Fifth Amendment and was contrary to Department of Justice policy.

After a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of conspiracy to import approximately 2,260 pounds of marijuana, in violation of 21 U.S.C. 963 (count one), and of conspiracy to possess the same quantity of marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (count two). Petitioners were sentenced to consecutive terms of five years' imprisonment on each count and to a five-year term of special parole. In addition, petitioners Kenneth Croucher and Michael

Francis were fined $5,000 and petitioners Robert Burke and Duane Morrison were fined $10,000. The court of appeals affirmed (525 F. 2d 943; Pet. App. 1a-18a) and, on June 1, 1976, denied a petition for rehearing with suggestion of rehearing *en banc* (Pet. App. 20a-21a).[1]

The evidence at trial showed that petitioners participated in the clandestine importation of more than a ton of marijuana from Mexico into this country on October 12 and 13, 1973. Agents of the Drug Enforcement Administration and the United States Customs Service tracked three private aircraft from Columbus, New Mexico, across the border into Mexico on the afternoon of October 12. Airborne surveillance teams observed the three airplanes land in a dry lakebed in Mexico, meet a large van, and then return to New Mexico approximately twenty minutes later (Tr. 87-92). When the airplanes arrived near Magdalena, New Mexico, at 9:30 p.m., one of the pilots radioed "ground support" to "turn on your flashers." The agents then saw a set of automobile emergency flashers blink on and off for a few seconds (Tr. 93-96). Shortly thereafter, the automobile drove to another location and turned on its lights. The three airplanes then landed beside the automobile and took off again a few minutes later (Tr. 98-99, 105).

New Mexico State Police subsequently arrested petitioner Croucher at the spot where the aircraft had landed and found 2,260 pounds of marijuana in brick form stacked nearby. After receiving *Miranda* warnings, petitioner Croucher told the arresting officers that he had

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[1]The court reversed the convictions of co-defendants Martin Houltin and Kenneth Phillips after finding that evidence against them had been obtained through the exploitation of illegal wire interceptions (Pet. App. 6a-14a).

been left to guard the marijuana and was being paid $1,000 for his role in the smuggling operation (Tr. 253-254). Petitioners Burke, Morrison and Francis were arrested along with co-defendant Houltin at the Columbus airport as they alighted from the airplanes. The arresting agents searched the planes and found marijuana debris in each of them (Tr. 319-323).[2]

Prior to their federal convictions, petitioners pleaded *nolo contendere* in a New Mexico state court to the charge, growing out of these events, of possession of more than eight ounces of marijuana, in violation of N.M. Stat. Ann. 54-11-23B(3) (1975 Pocket Supp.). Each was sentenced to 18 months' probation.

1. Petitioners contend (Pet. 16-18) that the Double Jeopardy Clause of the Fifth Amendment precluded their federal prosecution after they had been convicted by the State of New Mexico for their roles in the same illegal drug transaction. This Court has expressly held, however, that a federal prosecution following a state prosecution for the same conduct is not barred by the Fifth Amendment. *Abbate* v. *United States*, 359 U.S. 187; *United States* v. *Lanza*, 260 U.S. 377; see also *Bartkus* v. *Illinois*, 359 U.S. 121.

2. a. Shortly after the rulings in *Bartkus* and *Abbate*, the Department of Justice adopted a formal policy of declining to prosecute individuals for acts forming the basis of a state conviction unless there exist "most compelling reasons," and then only after the specific approval of the Attorney General or an Assistant Attorney General has been obtained. See *Petite* v. *United States*, 361

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[2]Co-defendant Phillips, who had apparently been manning the "ground support" automobile, was arrested at a roadblock near the site where the marijuana had been found (Tr. 299-301).

U.S. 529, 531; *Watts* v. *United States*, 422 U.S. 1032 (vacated and remanded to permit the government to move to dismiss); *Ackerson* v. *United States*, 419 U.S. 1099 (same). Petitioners have alleged, and our review has confirmed, that no such approval was sought or obtained in this case.

In our view, the failure of the United States Attorney to obtain authorization from the Department of Justice before prosecuting a charge that is subject to the Department's "dual prosecution" policy, while contrary to internal Department procedures, confers no right enforceable by the defendant to obtain dismissal of the charges. What is involved in such situations, rather, is a matter of the exercise of prosecutorial discretion (and, where a prosecution has been commenced without appropriate authorization and retroactive authorization is not issued, of judicial grace in cooperating with the executive branch in the implementation of Departmental policy). Thus, petitioners have no legal entitlement to relief on this ground. *Sullivan* v. *United States*, 348 U.S. 170.

b. After reviewing the facts of this case, we have concluded that the offense of conspiracy to import marijuana into this country does involve a compelling federal interest that is distinct from any interest vindicated by petitioners' prior state convictions on the charge of simple possession of the drug. Accordingly, petitioners' federal prosecution for conspiracy to import marijuana has been approved by the Attorney General pursuant to Departmental guidelines and there is thus no basis for disturbing their convictions on the importation count.

We believe, however, that petitioners' prosecution for conspiracy to possess marijuana was not supported by an independent compelling federal interest in light of the substantial similarity between that charge and the offense of which petitioners were convicted in state

court. We therefore respectfully request the Court to permit the effectuation of this governmental policy by granting the petition, vacating the judgment of the court of appeals only as to the charge of conspiracy to possess marijuana (count two), and remanding the case to the district court with instructions to grant the government's motion to dismiss that count.[3] In all other respects the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1976.

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[3] In view of the relief we have requested, it is unnecessary for the Court to consider petitioners' additional contention that they could not be convicted or given cumulative punishment on separate counts of conspiracy to import and conspiracy to possess marijuana, in violation of 21 U.S.C. 963 and 846.